

**1501097 (Migration) [2016] AATA 3512 (3 March 2016)**

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division

**REVIEW APPLICANT:** Ms Dinh Kim Tran

**VISA APPLICANTS:** Mr Thanh Lang Tran  
Mr Cong Nghiep Tran

**CASE NUMBER:** 1501097

**DIBP REFERENCE(S):** 2014026966 OSF2014/026966

**MEMBER:** Lisa Lo Piccolo

**DATE:** 3 March 2016

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

Statement made on 03 March 2016 at 5:41pm

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 12 December 2014 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 11 July 2014 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.221(2) because there was insufficient evidence to demonstrate that the applicant and the sponsor were in a genuine and continuing relationship. A copy of the decision record was provided to the Tribunal by the sponsor.
4. The review applicant appeared before the Tribunal on 17 February 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant Mr Thanh Lang Tran and Yen Chu.
5. The review applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

7. The issue in the present case is whether the applicant is the spouse of the sponsor.

### **WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP**

8. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is and Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review

applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

### **ARE THE PARTIES VALIDLY MARRIED?**

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant and the sponsor were married on 24 May 2013. The applicant and the sponsor submitted a certified copy of their marriage certificate issued in Australia. There is nothing in the information before me to cast doubt on the validity of the marriage, and it was not disputed by the delegate. The Tribunal accepts that the visa applicant and the review applicant were validly married under the laws of Australia, and finds that the marriage is valid for the purposes of the Act as required by s.5F(2)(a).

### **ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?**

11. Background
12. The applicant is a 49 year-old male. He is a citizen of Vietnam. The sponsor is a 55 year old Australian citizen of Vietnamese descent. The applicant first came to Australia in July 2007 on a subclass 580 guardian visa. This visa expires on 31 July 2017.
13. The applicant and the sponsor claim that they met at the Holy Eucharist Church bookstore at a Christmas Eve service in 2010. After that first meeting they often met at Sunday mass and became friends. They started socialising together after 3 months and became close. The applicant and one son moved in to live with the sponsor at her house in St Albans in February 2012. The applicant and sponsor married on 24 May 2013.
14. On 6 August 2013 the applicant applied for the subclass 309 visa and she was sponsored in connection with the visa application by the sponsor. The Delegate was not satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, or that the relationship was genuine and continuing.
15. The Tribunal must consider all the circumstances of the relationship, (including the criteria specified in r.1.15A) in determining whether the parties are in a "married relationship" as defined by s.5F, and whether the relationship falls within the definition of "spouse".
16. In assessing these issues, the Tribunal has had regard to all documents on the Departmental file as well as the documents submitted to the Tribunal. This includes money transfers, greeting cards exchanged between each other, printouts of viber conversations, telephone records, photos of the visa applicant and sponsor with others, invoices of purchase of goods in joint names, bank statements in joint names, applicant's visitor visas and associated statutory declarations, sponsor's travel itinerary to Vietnam in February 2014, temporary stay declarations February 2014, joint receipts, statutory declarations (Form 888s), letters in support as well as the representative's submissions.
17. *Financial Aspect*
18. The consistent evidence before the Tribunal is that the applicant contributed \$500 per month together with his wife when they started living together. This was to cover rent and bills. They both told the Tribunal that the sponsor was working in a chicken shop

at that time so she paid the mortgage, food and utility bills. They also gave consistent evidence that the applicant gives more money if the sponsor needs it. He told the Tribunal that he has a business buying and selling pigs in Vietnam so every couple of months his brother would send him money. In terms of his youngest son, both were consistent in their evidence that the applicant meets these expenses.

19. The Tribunal notes there is no evidence of joint assets or pooling of resources. The Tribunal puts little weight on this aspect of the relationship.
20. *The nature of the household*
21. The Tribunal notes that the parties claim to have lived together since February 2012 since the applicant is living in Australia on a guardian visa. The Tribunal accepts the consistent oral evidence of the parties supported in part by the documents and a significant number of photographs and other receipts that the applicant and sponsor have lived together for some considerable period.
22. The Tribunal notes the consistent evidence of the parties that they share the responsibility for the care and welfare of the applicant's son, and that the sponsor plays a motherly role. The parties were also consistent in their evidence that they share household chores though he does the laundry, cleaning and cooking most of the time.
23. The Tribunal places some weight on this aspect of the relationship.
24. *Social aspects of the relationship*
25. In relation to the social aspects of the relationship, the visa applicant and the sponsor have submitted a number of photographs intended to demonstrate the social aspect of the relationship. There is evidence before the Tribunal that the applicant and the sponsor have travelled to Sydney together to visit his family. There are photographs of the visa applicant spending time together with the sponsor in Vietnam and attending her mother's funeral in Vietnam. There are many photographs of the review applicant's visits including photographs with other family and friends. The Tribunal places some weight on the photographs.
26. The Tribunal has also had regard to the oral evidence received regarding the social and public recognition of the relationship as well as their mutual commitment to each other and their lives together. In particular, the Tribunal places some weight on the evidence of Yen Chu. She is an acquaintance of the applicant and owns a restaurant in Box Hill. Her evidence was that she met the sponsor for the first time in 2012 when they came to the restaurant for dinner. She indicated that they had both attended her 70<sup>th</sup> birthday celebration two years ago and saw them together at her restaurant on Valentine's day this year. She stated that she sees them very happy together and thinks they are a genuine couple.
27. The Tribunal notes that the applicant and sponsor did give inconsistent evidence in relation to their respective travel to Vietnam, particularly when and for how long they went there. Noting the frequency with which the applicant returns to Vietnam to attend to business related matters, the Tribunal has given the benefit of the doubt to the parties and does not place any adverse weight on this inconsistency.
28. In view of the above, the Tribunal is satisfied that there has been some public recognition of the visa applicant and the review applicant's relationship.

•

- *Nature of persons' commitment to each other*

29. In respect to the nature of the parties' commitment, the Tribunal gives weight to the fact the couple have now been together for more than 4 years and have been married for 3 years. The Tribunal place significant weight on this.
30. The Tribunal found the evidence of the applicant and the sponsor to be credible. There were minor inconsistencies in their evidence which were explained and clarified to the satisfaction of the Tribunal. For this reason, the Tribunal places little weight on them.
31. The applicant and sponsor gave evidence that they provide each other with support during happy and sad times and that they rely on each other for this. The sponsor told the Tribunal that the applicant was an immense support to her when her mother died and he assisted her through the grieving process. They were consistent in their evidence that their plan for the future is to work together to make a future for their children. They were also both consistent that the applicant would like to work in Australia so he can assist the sponsor on a more regular basis with the mortgage and that they may look to open a business in Australia.
32. The Tribunal notes that the parties gave consistent evidence that the sponsor plays a significant role in the care, welfare and development of the applicant's son and is even listed as an emergency contact at his school and attends school interviews. Both said that this has been the case since they moved in together in 2012.
33. The Tribunal has taken into account the parties' respective ages, backgrounds and life experience, and accepts that neither party was in a relationship with any third party at the time of the application, or that this is the case at the time of this decision. The Tribunal questioned the parties about their knowledge of each other, their families and the pattern of their lives. The Tribunal notes that the applicants' had extensive knowledge of each other's family structure, their respective work and social lives, and their financial commitments and earnings. The Tribunal is satisfied that they demonstrated a knowledge of each other's lives commensurate with a couple in a genuine and ongoing spousal relationship.
34. In respect to whether there is a mutual commitment to a shared life as husband and wife to the exclusion of all others the Tribunal gives great weight to the evidence submitted as outlined above.
35. **CONCLUSIONS**
36. The Tribunal is satisfied that the marriage is valid for the purposes of the Act as required by s.5F(2)(a).
37. The Tribunal is satisfied that at the time of application and time of decision the visa applicant and sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. They therefore meet the requirements of s.5F(2)(b) and s.5F(2)(c) for a married relationship.
38. The Tribunal is satisfied that at the time of application and time of decision the visa applicant and the sponsor have lived together, and do not live separately and apart on a permanent basis. Accordingly, they meet the requirements of s.5F(2)(d) for a married relationship.

39. The Tribunal therefore finds that at the time of the visa application the visa applicant was the spouse, within the meaning of s.5F, of the sponsor, who is an Australian citizen and meets the requirements of cl.309.211(2) of Schedule 2 to the Regulations. Further, the Tribunal finds that at the time of the Tribunal's decision the visa applicant continues to be the sponsor's spouse, and meets cl.309.221 of Schedule 2.
40. For these reasons the Tribunal finds that at the time of application the visa applicant and sponsor were in a married relationship within the meaning of s.5F(2) of the Act. The Tribunal further finds that at the time of decision, they continue to be in a married relationship.
41. Therefore the visa applicant meets cl.309.211 and cl.309.221.
42. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.
43. As the second named visa applicant applied on the basis of being a member of the first named visa applicant's family unit, his application will be determined by reference to the outcome of the first named visa applicant's application on remittal to the Department for reconsideration.

## **DECISION**

44. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
  - cl.309.211 of Schedule 2 to the Regulations
  - cl.309.221 of Schedule 2 to the Regulations

Lisa Lo Piccolo  
Member

- 
-

## **ATTACHMENT - Extract from Migration Regulations 1994**

### **1.15A Spouse**

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day-to-day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).